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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,

Petitioner,

—v.—

UNIVERSAL MARITIME SERVICE CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE SECURITIES INDUSTRY ASSOCIATION AS AN *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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I. CONSENT TO FILE *AMICUS CURIAE* BRIEF[1]

The Securities Industry Association ("SIA") files this *amicus curiae* brief with the consent of the parties.

II. STATEMENT OF INTEREST

The SIA brings together the shared interests of more than 780 securities firms throughout North America. SIA members—including investment banks, broker-dealers, specialists, and mutual fund companies—are active in all markets and in all phases of corporate and public finance. In the United States, SIA member firms collectively account for approximately 90 percent, or $100 billion, of securities firm revenues and employ 350,000 individuals. They manage the accounts of more than 5 million investors directly and tens of millions of investors indirectly through corporate thrift and pension plans.

The employees of SIA member firms frequently agree to arbitrate all claims arising out of their employment—either by virtue of registering with a self-regulatory organization whose rules require arbitration or by executing a private arbitration agreement with his or her firm. Further, in the securities industry, employment claims are almost always intertwined with performance issues that may have regulatory significance. For these reasons, arbitration of statutory employment claims is an important part of how SIA's members conduct business.

The SIA is familiar with the questions involved in this case and believes that it would be helpful to the Court to file this *amicus curiae* brief in order to assist the Court in the resolution of this case.

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[1] This *amicus curiae* brief in support of affirmance was funded solely by the SIA and authored entirely by counsel for the SIA.

III. SUMMARY OF ARGUMENT

This Court and the circuit courts of appeal have held that requiring an employee to arbitrate his statutory claims raises unique legal and policy issues when, as here, the agreement to arbitrate is contained in a collective bargaining agreement. First, arbitration of disputes in a unionized setting usually implicates contractual, not statutory, claims. Second, enforcing such an arbitration provision raises concerns regarding the tension between collective representation and individual statutory rights. Finally, individual agreements to arbitrate, unlike collectively bargained agreements, are subject to the Federal Arbitration Act's, 9 U.S.C. § 1, *et seq.* ("FAA"), "liberal policy favoring arbitration agreements." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 105 S.Ct. 3346, 3353 (1985).

Because SIA member firms frequently require their employees to enter into agreements to arbitrate which are *not* collectively bargained and which, therefore, do not raise these legal and policy concerns, SIA urges this Court to define the issue presented in this case narrowly and not to issue a broad ruling which implicates individual arbitration agreements.

IV. ARGUMENT

Participants in the securities industry created their own organizations, rules and practices to promote the fair and efficient operation of financial markets. Some of these practices have been in place for over 150 years. One long-established industry practice has been the use of arbitration, rather than litigation, to resolve disputes.

Arbitration of disputes within the securities industry began as early as 1872, when the New York Stock Exchange ("NYSE") became the first securities exchange to provide arbitration as an alternative to resolution of disputes through litigation. *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, GAO Report HEHS-94-17 at 3 (1994) ("GAO Report"). Today, an estimated 32% of the employees of the largest 50 securities firms in the United States have agreed to arbitrate disputes surrounding their employment by signing a Uniform Application for Registration or Transfer (known as a "Form U-4") to register with a self-regulatory organization that requires arbitration of such disputes.[2] *Id.* Other securities industry employees have agreed to arbitrate their employment claims pursuant to private arbitration agreements with SIA member firms.

In *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991), this Court held that a claim for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), can be subject to compulsory arbitration pursuant to an agreement to arbitrate contained in a Form U-4. Rejecting Gilmer's argument that *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974), precludes arbitration of employment discrimination claims, this Court emphasized the differences between arbitration in the collective bargaining context and agreements to arbitrate pursuant to the Form U-4.

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[2] The Form U-4 requires employees to abide by the arbitration rules of the self-regulatory organizations with which they register:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register as indicated in Item 10, as may be amended from time to time.

The NYSE's Rules of Arbitration, for example, require arbitration of:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.

Rule 347, NYSE Rules of Arbitration.

Like Ceasar Wright, the plaintiff in *Gardner-Denver* was a union member who brought suit against his employer in federal court asserting a violation of a federal anti-discrimination statute. The district court granted the employer's motion for summary judgment because the issues surrounding the plaintiff's termination previously had been decided by an arbitrator, pursuant to the arbitration provision in the employer's collective bargaining agreement with the union. This Court reversed, emphasizing the difference between contractual rights under a collective bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators. *Id.* at 49-54, 94 S.Ct. at 1020-22; *Gilmer*, 500 U.S. at 35, 111 S.Ct. at 1657. *See also Barrentine* v. *Arkansas Best Freight Sys., Inc.*, 450 U.S. 728, 101 S.Ct. 1437 (1981); *McDonald* v. *West Branch*, 466 U.S. 284, 104 S.Ct. 1799 (1984).

By contrast, Gilmer, like many employees of SIA member firms, agreed to arbitrate all claims arising out of his employment, including statutory discrimination claims, by executing a Form U-4. As this Court correctly noted in *Gilmer*, employees who sign individual agreements to arbitrate authorize arbitrators to resolve their statutory claims, unlike employees who, by virtue of their union membership, submit claims arising out of the applicable collective bargaining agreement to arbitrators whose decision-making authority is limited to contract-based disputes. *Gilmer*, 500 U.S. at 35, 111 S.Ct. at 1657. Further, an "important concern" raised by arbitration in the context of a collective bargaining agreement is the tension between collective representation and individual statutory rights, a concern not applicable in [*Gilmer*]." *Id.* That is, "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Gardner-Denver*, 415 U.S. at 58 n.19, 94 S.Ct. at 1024 n.19. Lastly, an arbitration agreement contained in an individual

arbitration agreement such as a Form U-4, unlike an arbitration provision in a collective bargaining agreement, must be analyzed under the rubric of the FAA's "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 35, 111 S.Ct. at 1657 (quoting *Mitsubishi*, 473 U.S. at 625, 105 S.Ct. at 3353).

Simply put, because arbitration agreements in the collective bargaining context present unique policy concerns, this Court and others have held that *Gardner-Denver* does not preclude compulsory arbitration of statutory claims pursuant to individual agreements to arbitrate, such as the Form U-4. *Id.* at 33-35, 111 S.Ct. at 1656-57; *see also Seus* v. *John Nuveen & Co., Inc.*, 1998 WL 294020 (3rd Cir. June 8, 1998); *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1478-79 (D.C. Cir. 1997); *Bender* v. *A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992); *Willis* v. *Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991); *But cf. Nghiem* v. *NEC Elec., Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994). Thus, this Court should limit its holding in the instant case to arbitration of statutory employment claims pursuant to arbitration provisions contained in collective bargaining agreements.

V. CONCLUSION

Arbitration of employment claims pursuant to individual agreements to arbitrate, such as the Form U-4, at least in the context of claims brought under the ADEA has already been decided by this Court in *Gilmer*. Whether the rationale and holding of *Gilmer* applies with respect to individual agreements to arbitrate claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, should not be resolved in the context of this case but, rather, should be addressed by the Court when that issue is squarely before it. Therefore, *amicus curiae*, the SIA, respectfully requests that this Court limit its ruling in the instant case to arbitration of

claims pursuant to the arbitration provisions of collective bargaining agreements.

June 29, 1998

Respectfully submitted,

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